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No. 772

In the

Supreme Court of the United States

OCTOBER TERM 1966

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY
AND GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,
Respondents.

Reply of Respondent, General Telephone Company of the Southwest to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondent, General Telephone Company of the Southwest, prays that Petition for Writ of Certiorari be denied.

STATEMENT

Petitioners' Statement is substantially correct but is deficient in failing to set forth the tariff on file with the Federal

Communications Commission. The applicable provisions of that tariff are as follows:

TARIFF F.C.C. NO. 132

"AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
LONG LINES DEPARTMENT

MESSAGE TOLL TELEPHONE SERVICE

B. GENERAL REGULATIONS (Cont'd)

7. *Unauthorized Attachments or Connections*

No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

24. *Miscellaneous Devices Provided by the Customer* (Filed in compliance with Federal Communications Commission order dated February 6, 1957, in Docket No. 9189)

The provisions of Paragraph 7. preceding shall not be construed or applied to bar a customer from using devices which serve his convenience in his use of the facilities of the Telephone Company in the service for which they are furnished under this tariff, provided any such device so used would not endanger the safety of Telephone Company employees or the public; damage, require change in or alteration of, or involve direct electrical connection to, the equipment or other

facilities of the Telephone Company; or interfere with the proper functioning of such equipment or facilities; or impair the operation of the telephone system or otherwise injure the public in its use of the Telephone Company's services.

Except as otherwise provided in this tariff, nothing herein shall be construed to permit the use of a recording device, or of a device to interconnect any line or channel of the Telephone Company with any other communication line or channel of the Company or of any other person." (R. 102)

REASONS FOR DENYING THE WRIT

At the heart of the present controversy is the Federal Communications Act (47 U.S.C. 151 et seq) and its impact on Petitioners, Respondents and their customers and prospective customers. Respondents are common carriers engaged in communications by wire and are subject to the act and regulations thereunder (47 U.S.C. 152-153).

The provisions of the Federal Communications Act were summarized in the opinion of the Court of Appeals as follows:

"The starting point is the Communication Act of 1934, 47 U.S.C.A. Sec. 151 et seq. The National communications policy is broadly stated 'to make available * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *', 47 U.S.C.A., Sec. 151. The execution of the statutory scheme is committed to the FCC. And this structure, with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation.

"To achieve these goals, the Communication Act grants a broad range of powers to the Federal Communications Commission. 47 U.S.C.A. Sec. 201-222. The Commission has the power to require a telephone company to furnish 'service upon reasonable request therefor,' and, where the Commission 'finds such action necessary or desirable in the public interest,' to require interconnection with other carriers at rates set by the Commission after opportunity for hearing. 47 U.S.C.A., Sec. 201(a). 'All charges, practices, classifications, and regulations' of telephone companies 'shall be just and reasonable;' 'unjust or unreasonable' charges are unlawful, 47 U.S.C.A. Sec. 201(b). The Commission has the power to prescribe such rules and regulations as are 'necessary in the public interest' to carry out the provisions of the Act. 47 U.S.C.A. Sec. 201(b). To this end, the Commission has promulgated 493 pages of regulations governing the common carrier services provided by telephone companies. 47 C.F.R., Parts 20-69. It is unlawful for a telephone company to discriminate in any 'unjust or unreasonable' manner in its 'charges, practices, classifications, regulations, facilities, or services.' 47 U.S.C.A., Sec. 202(a). Each telephone company is required to file with the Commission, and keep open for public inspection, tariffs setting forth its charges, classifications, regulations, and practices. 47 U.S.C.A., Sec. 203(a). Such tariffs must be followed until such time as they are amended in the manner provided by the statute. 47 U.S.C.A., Sec. 203(b). A telephone company may not deviate from the rates, classifications, regulations or practices contained in the tariffs so filed. 47 U.S.C.A., Sec. 203(c).

"The FCC has the power and duty to examine all tariffs filed and may either on complaint or on its own initiative determine and prescribe what charges, classifications, regulations, and practices are 'just, fair, and reasonable' and are to be thereafter followed by the telephone company in question. 47 U.S.C.A., Sec. 205(a). The Commission is given extensive power to assess the value of

> the facilities of telephone companies. 47 U.S.C.A., Sec. 213. The Commission has the power to order a telephone company to provide additional facilities for the performance of its duties as a public utility, if such addition is 'in the interest of public convenience and necessity' or 'the expense involved therein will not impair the ability of the carrier to perform its duty to the public.' 47 U.S.C.A., Sec. 214(d). However, a carrier does not have the right to extend its lines unless the Commission authorizes it to do so by the issuance of a certificate of public convenience and necessity. 47 U.S.C.A., Sec. 214(a). The Commission has power to examine transactions entered into by any common carrier which may affect the carrier's charges or services. 47 U.S.C.A., Sec. 215(a). The Commission has the specific duty to keep informed as to 'technical developments and improvements in wire and radio communication * * * to the end that the benefits of new inventions and developments may be made available to the people of the United States.' 47 U.S.C.A., Sec. 218." (365 F. 2d 486 at 494-495)

In addition, a telephone company may not provide service unless schedules or tariffs are filed covering such service. 47 U.S.C. 203(c).

The Court of Appeals concluded that the effect of the Act is that "* * * scarcely a single business act is free from continuous regulation or at least administrative governmental review * * * *" (365 F. 2d 486, at 495).

1. The *Per Se* Antitrust Violation Rule does not apply

The pervasive regulatory scheme of the Communications Act prohibits application of the rule concerned with *per se* violation of the antitrust laws.

Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922);

Silver v. New York Stock Exchange, 373 U.S. 389 (1963).

> "What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry." *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 98 (1952).

2.. There Are Issues to be Determined by FCC

There are issues to be determined by the Federal Communications Commission. These involve AT&T Tariff F.F.C. No. 132, Message Toll Telephone Service, promulgated pursuant to the Communications Act. The issues raised by Petitioners' complaint are validity of the tariff and construction of the tariff, i.e. whether the tariff applied to prohibit use of the Carterfone (R86-87). Respondents' Motions to Dismiss also raise issues as to effect of the tariff on conduct of the telephone companies and liability for acts pursuant to the tariff. Each of these issues, and especially those of construction and validity, are to be determined by the Commission, at least in the first instance, under the doctrine of primary jurisdiction.

Primary jurisdiction is applied when a claim cognizable in the courts requires resolution of issues which, under a regu-

latory scheme, have been placed within the special competence of an administrative body.

United States v. Western Pacific R. Co., 352 U.S. 59 (1956).

The doctrine is also applied in order that the administrative body may perform its statutory obligation to see that rates and practices are equal and uniform.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1906);

United States v. Radio Corp. of America, 358 U.S. 334 (1959).

A third reason for applying the doctrine of primary jurisdiction is to utilize the agency's expert knowledge of and familiarity with the problems of the industry.

Far East Conference v. United States, 342 U.S. 570 (1951).

The issues in this case of validity or construction of the tariff are within the jurisdiction of the Federal Communications Commission. Petitioners seek to belittle this fact since the tariff involves service, practices and regulations rather than rates; this is a difference without legal effect since the Commission's power includes "* * * charges, practices, classifications and regulations for and in connection with such communication service * * *".

Ambassador, Inc. v. United States, 325 U.S. 317 (1944).

All of the reasons assigned for applying the doctrine of primary jurisdiction are here present. Construction and

validity of the tariff involve matters within the special competence and jurisdiction of the Commission. Likewise, court action in this or similar cases may well cause deviations from uniform application of the tariffs contrary to statutory mandate.

Petitioners contended below that the Carterfone did not actually connect with the telephone system although they would concede that the Carterfone does carry messages in connection with telephone company equipment. Thus, it appears that technical questions will arise as to what constitutes an interconnection. Likewise, technical questions may arise as to whether the Carterfone is suitable for use with telephone company equipment or if it may cause service problems. Other complex technical questions may arise. For example, see *Peters Sunset Beach Inc. v. Northwestern Bell Telephone Co.*, Minn. Railroad & Warehouse Comm. 1965, 60 PUR 3rd 363 (R. 118 et seq). The existence of such technical problems is an additional reason for applying primary jurisdiction.

Thus, construction of the tariff requires application of primary jurisdiction:

United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956);

Louisville & Nashville Railroad Co. v. Knox Homes Corp., CA 5 (1965), 343 F. 2d 887.

Validity of the tariff is likewise for the Commission:

U. S. Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1931);

Far East Conference v. United States, 342 U.S. 570 (1951);

Pan American World Airways v. United States, 371 U.S. 296 (1963).

The cases cited by Petitioners at pages 8-12 of their Petition for Writ of Certiorari are not contrary to the foregoing. In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959), the power of the Federal Communication Commission over television stations was contrasted to the public utility regulation of telephone companies as this court said:

> "Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears."

In *Silver v. New York Stock Exchange*, 373 U.S. 389 (1963), there was no occasion to apply the doctrine of primary jurisdiction since the agency involved, Securities & Exchange Commission, had *no jurisdiction* to determine the matter involved. *California v. Federal Power Commission*, 369 U.S. 482 (1962) and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) involved proposed mergers; in both these cases, as well as *United States v. Radio Corporation of America*, supra, involving exchange of television stations, administrative action on the merger or exchange had been completed before this court reached its decision. There was no need, then, to apply the doctrine of primary jurisdiction.

> "We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the in-

> tegrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme * * * Court jurisdiction is not thereby ousted, but only postponed * * *. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced." (Citations omitted.) *United States v. Philadelphia National Bank*, supra.

3. Antitrust v. Administrative Standards

Petitioners' primary argument is that the doctrine of primary jurisdiction does not apply since any decision by FCC is for administrative purposes only and not for antitrust purposes. This argument is contrary to the decisions of this and other federal courts in regard to the effect to be given a pervasive regulatory scheme. In *Keogh v. Chicago & N.W. R. Co.*, 260 U.S. 156 (1922), this court said:

> "Section 7 of the Anti-trust Act gives a right of action to one who has been 'injured in his business or property'. Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier."

See also: *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963);

SSW, Inc. v. Air Transport Assn. of America, CADC (1951), 191 F. 2d 658, cert. den. 343 U.S. 955;

Pennsylvania Water & Power Co. v. F.P.C., CADC (1951), 193 F. 2d 230, affirmed 343 U.S. 414.

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1944), cited by Petitioners, was an original suit where Georgia alleged a conspiracy in violation of the antitrust laws to fix rail rates although the rates were approved by the I.C.C. This court there said:

> "We think it is clear from the Keogh Case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under Section 7 of the Sherman Act (July 2, 1890) 26 Stat. 209, 210, c.647. The Court recognized that although the rates fixed had been found reasonable and nondiscriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U.S. pp. 161, 162, 67 L. Ed. 187, 43 S. Ct. 47. It held, however, that for purposes of a suit for damages, a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged whether by the contract or tort of the carrier. And it added: 'This stringent rule prevails, because otherwise the paramount purpose of Congress -prevention of unjust discrimination- might be defeated. If a shipper could recover under Sec. 7 of the Anti-trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.' 260 U.S. p. 163. The reasoning and precedent of that case apply with full force here."

In recognition of these principles, the Court of Appeals held that "* * * a tariff, required by law to be filed, is not a mere contract. It is the law * * *" (265 F. 2d 486, 496). This is not an argument that Respondents are or are not im-

mune from the antitrust laws, nor that the F.C.C. has or does not have authority to immunize Respondents from antitrust liability. This is but giving effect to the statutory scheme and national policies represented by the Communications Act.

Likewise, it is the Communications Act and regulation thereunder that require application of primary jurisdiction to determine the issues raised by Petitioners' complaint.

The validity of a tariff established under a regulatory statute, when attacked in an antitrust suit, is to be determined by the agency involved under the doctrine of primary jurisdiction:

U. S. Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1931);

Far East Conference v. United States, 342 U.S. 570 (1951);

Pan American World Airways v. United States, 371 U.S. 296 (1963);

Interstate Natural Gas Co. v. Southern California Gas Co., CA 9 (1953) 209 F. 2d 380.

Petitioners' argument of antitrust standards as opposed to administrative standards ignores the Communications Act, the powers of the Commission thereunder, and the responsibilities and obligations imposed on Respondents thereby.

CONCLUSION

This cause involves an important question of federal law involving possible conflict between the antitrust laws and the laws governing an administrative agency. This question has, however, been decided by this court on several occasions by evolution of the rule of primary jurisdiction. The decisions of the trial court and of the Court of Appeals in this cause are in accordance with the decisions of this court applying primary jurisdiction and in accordance with the reasons given for applying such rule. There are no decisions in conflict with the holding of the Court of Appeals.

For the foregoing reasons, Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copy of the foregoing brief has been this day served on Counsel of Record for Petitioners and Counsel for Other Respondents by depositing the same in the United States mail, first class postage prepaid, addressed to such counsel at their post office addresses.

December 13, 1966

Lynell C. Ridgeway III

Attorney for Respondent,
General Telephone Company
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